



## **RECOMMENDATION REPORT**

**A report to the Minister recommending  
the introduction of a retail service  
determination**

*Issued by NICTA, Port Moresby on 26<sup>th</sup> July 2018*

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## **1 EXECUTIVE SUMMARY**

Part VII of the *National Information and Communications Technology Act 2009* (the Act) provides for the Minister, upon the recommendation of NICTA, to make a retail service determination in relation to a specific retail service supplied by an operator licensee.

NICTA has held a public inquiry into whether or not mobile-originated retail national voice call services that are supplied by Digicel (PNG) Ltd (“Digicel”) should be subject to a retail service determination that restricts the level of price discrimination between on-net and off-net calls. A similar retail service determination was established in 2012 and expired in October 2017. NICTA has also considered such a proposal for a retail service determination against the retail regulation criteria specified in section 158 of the Act and is satisfied that all of those criteria would be met by the introduction of such a retail service determination.

Accordingly NICTA recommends that the Minister subject mobile originated retail national voice call services that are supplied by Digicel to a retail service determination that contains a pricing principle that prevents discrimination between on-net and off-net prices unless, upon application by Digicel, NICTA is satisfied that a difference in on-net/off-net prices is objectively justifiable based on differences in the costs of supplying the service. For the avoidance of doubt, NICTA recommends that this pricing principle be applied without limitation to all pricing, including pre-paid cards, fixed-fee service bundles and to “free” or zero-rated charges that apply only to on-net calls.

NICTA recommends that this retail service determination apply for a period of five years, the maximum period permitted under the Act, provided however that it will be reviewed by NICTA after 3 years, in order to determine if a recommendation should be made to the Minister to revoke or revise the RSD. NICTA also notes that any interested party may apply, based on materially changed circumstances or otherwise, for such a recommendation to be made by NICTA before or after this mandatory review, and NICTA also could on its own initiative undertake such a further review.

A draft retail service determination that reflects this recommendation (and which NICTA has considered against, and is satisfied meets all of, the retail regulation criteria) is provided at Annex A.

This report identifies the particular terms of the recommended retail service determination and the extent to which the retail regulation criteria would be met by the recommended determination. This report fulfils the requirement set out in subsection 159(1) of the Act. This report shall also be considered to be a public inquiry report that NICTA is obliged to publish pursuant to Section 235(1) of the Act.

NICTA has consulted with the Independent Consumer and Competition Commission (ICCC) throughout the inquiry process and in the preparation of this report.

## 2 BACKGROUND

### 2.1 RETAIL SERVICE DETERMINATIONS

Part VII of the *National Information and Communications Technology Act 2009* (the Act) sets out special arrangements relating to consumer protection and the regulation of retail pricing. Under section 157 of the Act, NICTA is able to hold a public inquiry under section 230 of the Act to determine whether or not it should recommend to the Minister that one or more particular retail services supplied by one or more specified operator licensees should be subject to a retail service determination.

A retail service determination is a regulation that is made by the Minister based on the recommendation of NICTA. NICTA's recommendation must be based on the application of the retail regulation criteria that are set out in Section 158 of the Act, which are as follows:

- (a) that making a retail service determination for the retail service in respect of an operator licensee for a particular period will further the achievement of the objective set out in section 124 but disregarding section 124(2);<sup>1</sup> and
- (b) specifically, in relation to the competition objective, that –
  - (i) that operator licensee has a substantial degree of power in the market within which the retail service is supplied; and

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<sup>1</sup> Section 124(1) of the Act states 'The objective of this Part [Part VI] and Part VII of this Act is to –  
(a) promote effective competition in markets for ICT services in Papua New Guinea, to be known as the "**competition objective**", subject to –  
(b) promoting the economically efficient use of, and the economically efficient investment in, the facilities by which ICT services may be supplied, to be known as the "efficiency objective".  
Section 124(2) of the Act, which is to be disregarded in any consideration of the retail regulation criteria, states 'In determining the extent to which a particular thing is likely to further the achievement of the efficiency objective, regard shall be had (without limitation) to all of the following matters –  
(a) whether it is technically feasible for the relevant ICT services to be supplied, having regard to –  
(i) the technology available or likely to become available; and  
(ii) the reasonableness of the costs involved; and  
(iii) the effect of supplying the ICT services on the integrity, operation or performance of other ICT services or facilities; and  
(b) the legitimate commercial interests of the access provider in supplying the ICT services, including the ability of the access provider to exploit economies of scale and scope; and  
(c) the incentives for investment in the facilities by which the ICT services may be supplied, including the risks involved in making the investment.'

- (ii) in the absence of the retail service determination for that period, that substantial degree of power is likely to –
  - (A) persist in the market over that period; and
  - (B) expose retail customers to a material risk of higher prices and/or reduced service where they acquire the retail service from that operator licensee during that period; and
- (c) specifically, in relation to the efficiency objective, that the operator licensee will not be prevented from achieving a return on assets during that period sufficient to sustain investment necessary to supply the retail service; and
- (d) the aggregate likely benefits of making that retail service determination outweigh any aggregate likely detriments.<sup>2</sup>

The specific matters that a retail service determination may specify are set out in section 161 of the Act. In summary, section 161:

- requires that a retail service determination must specify the operator licensee to which it refers (and may apply to more than one operator licensee);<sup>3</sup>
- provides that a retail service determination may
  - regulate prices for the supply of the retail service;<sup>4</sup>
  - specify service standards that the operator licensee supplying the retail service must meet;<sup>5</sup>
  - specify any pricing policies and/or principles that must be complied with by the operator licensee in pricing the retail service;<sup>6</sup>
  - specify conditions relating to the price of the retail service, including that any calculation is to be performed, or a matter is to be determined, by NICTA;<sup>7</sup> or
  - require the operator licensee to provide specified information to NICTA, retail customers, or any other persons;<sup>8</sup>
  - require the operator licensee to supply the retail service in particular areas or to particular classes of retail customer;<sup>9</sup> and/or
  - require the operator licensee to comply with any terms and conditions advised by NICTA that NICTA considers are necessary or desirable to give effect to any of the matters listed [in the section];<sup>10</sup>

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<sup>2</sup> Section 158 of the Act

<sup>3</sup> Subsection 161(1) of the Act

<sup>4</sup> Paragraph 161(2)(a) of the Act

<sup>5</sup> Paragraph 161(2)(b) of the Act

<sup>6</sup> Paragraph 161(2)(c) of the Act

<sup>7</sup> Paragraph 161(2)(d) of the Act

<sup>8</sup> Paragraph 161(2)(e) of the Act

<sup>9</sup> Paragraph 161(2)(f) of the Act

- provides that in relation to retail service price regulation, that the retail service determination may do many things including fixing a price, determining price increases and decreases, determining indices, regulating revenue outcomes, and requiring approvals on a periodic basis.<sup>11</sup>

The Act therefore gives very wide scope to the matters that the Minister, on NICTA's recommendation, may include in a retail price determination. A determination may not have retrospective effect.<sup>12</sup>

## **2.2 NICTA'S PUBLIC INQUIRY**

Under section 157 of the Act, NICTA may hold a public inquiry into whether or not a recommendation should be made to the Minister that a retail service should be subject to a retail service determination in respect of a particular operator licensee. Such an inquiry may be initiated by NICTA on its own initiative or in response to a written request for any person asking NICTA to hold such an inquiry.

On this occasion the public inquiry was initiated by NICTA. It followed the expiry in October 2017 of Retail Service Determination No. 1 of 2012, which had previously controlled the extent to which Digicel was allowed to price differentiate between on-net calls and off-net calls originating on its mobile network. NICTA undertook a preliminary examination of the need to continue with some form of price regulation following the expiry of the 2012 Determination and concluded that there were matters that warranted being tested and considered further through a public inquiry process. In November 2017, NICTA issued a public discussion paper that set out NICTA staff's preliminary examination of what they considered to be the key relevant issues. The purpose of the discussion paper was to determine whether or not there were grounds that warranted NICTA issuing a new retail service determination and, if so, how that determination should differ from the 2012 Determination.

The Public Inquiry was extensive and NICTA provided three separate opportunities for stakeholders to make submissions on the issues they considered to be important

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<sup>10</sup> Paragraph 161(2)(g) of the Act

<sup>11</sup> Paragraph 161(2)(a) of the Act

<sup>12</sup> Sub-section 161(3) of the Act

in relation to a proposed Retail Service Determination on this subject. A second opportunity for stakeholders to comment on the submissions of other stakeholders was provided. A number of such cross-submissions were received on 6 April 2018.

At the request of Digicel a further opportunity was established for stakeholders to comment on the draft proposed RSD which had developed considerably from the version that was attached to the Discussion Paper in November 2017. Two responses were received: one, from Telikom, fully supported the approach that NICTA was proposing, and the other, from Digicel, was concerned with process issues and did not comment on the proposed RSD as such.

NICTA considered all of the issues raised in the submissions and comments received from respondents to the public consultation document and concluded that, while some continuing price regulation is necessary, some of the proposals raised in the discussion paper were likely to be hard to administer and overly burdensome on Digicel. NICTA has therefore amended the proposals in the light of the comments received and further consideration of the issues raised by those comments. NICTA now proposes that the pricing of on-net calls (including tariffs, charges, discounts and promotional offers) should also apply to off-net calls, unless Digicel has justified any difference in terms of costs and NICTA has indicated in writing that it accepts the justification.

After detailed analysis and consideration of all of the evidence and arguments submitted to NICTA through the public consultation exercise, NICTA considered whether the retail regulation criteria would be met by the Minister's introduction of the recommended retail service determination. NICTA is satisfied that all of the criteria would be met.

### **3 THE RECOMMENDED TERMS FOR THE PROPOSED RETAIL SERVICE DETERMINATION**

The recommended terms of the proposed retail service determination are identified below. A draft determination reflecting these terms is provided at Annex A.

#### **3.1 PROPOSED LICENSEE**

A retail service determination must specify the operator licensee to which it applies (s.161). Although a retail service determination may apply to more than one licensee, it may only apply to licensees that have a substantial degree of power in the market (SMP) in which the retail service is supplied (s.158).

As NICTA found that Digicel alone has SMP in the retail mobile services market, NICTA recommends that the proposed retail service determination apply only to Digicel.

#### **3.2 PROPOSED RETAIL SERVICE**

A retail service determination must specify the particular retail service to which it applies (s.159, s.161). It does not need to apply to all of the services in the market in which the particular retail service is supplied.

As NICTA found that Digicel's on-net/off-net price discrimination is greatest and most problematic in relation to its supply of national mobile voice calls, and is unlikely to be as problematic in relation to its supply of SMS or data services, NICTA recommends that the retail service determination apply only to Digicel's supply of mobile originated national retail voice call services. That is, NICTA recommends that the retail service determination should not apply to SMS and data services or any other types of retail mobile services that might be introduced during the period the determination is in effect.

NICTA recommends that the proposed retail service determination apply only to mobile-to-mobile call services and not also to mobile-to-fixed call services, which always terminate off-net. Similarly, NICTA recommends that the retail service

determination apply only to national calls (i.e. calls made within PNG) as international calls always terminate off-net.

NICTA considers that the negative effects of on-net/off-net price discrimination can be sufficiently addressed by limiting the scope of the retail service determination to the particular service that represents the overwhelming majority of the market. By excluding the application of both SMS and data services NICTA's recommendation also limits the application of the proposed retail service determination to the minimum necessary to address the identified problems and is thus proportionate to the problem.

If the recommendation is adopted by the Minister in a determination, NICTA intends to monitor this situation during the period that any such determination is in effect and may recommend to the Minister during that period any appropriate change, including that the scope of the determination be expanded or reduced if warranted by a change of circumstances.

### **3.3 PROPOSED PERIOD**

A retail service determination must specify an expiry date that is not longer than five years from the commencement of the determination (s.159). A determination may not apply retrospectively (ss.161 (3)).

NICTA recommends that, if the Minister makes the recommended retail service determination, it apply for a period of five years, the maximum period permitted under the Act, provided however that it will be reviewed by NICTA after 3 years, in order to determine if a recommendation should be made to the Minister to revoke or revise the Retail Service Determination. NICTA also notes that any interested party may apply, based on materially changed circumstances or otherwise, for such a recommendation to be made by NICTA before or after this mandatory review, and NICTA also could on its own initiative undertake such a further review.

### **3.4 PROPOSED TERMS**

A retail service determination may specify a pricing policy and/or principle that must be complied with by a licensee in its pricing of a retail service (s.161(2)(c)). A

determination may also specify conditions relating to the pricing of a retail service that are to be determined by NICTA (s.161(2)(d)) and require a licensee to supply specified information to NICTA on specified terms (s.161(2)(e)).

NICTA recommends that the proposed retail service determination establish a pricing principle that there must be no price discrimination based on the identity of the terminating mobile network unless such discrimination can be objectively justifiable based on differences in the associated costs. For this exception to apply, Digicel would need to demonstrate to NICTA's satisfaction that its costs are different for its supply of mobile originated national voice call services to different terminating mobile networks—including on-net termination on its own network—and that, as a consequence, a specific difference in the retail prices is warranted.

## **4 OVERVIEW OF THE REASONS FOR NICTA'S RECOMMENDATION**

NICTA has concluded that Digicel has a substantial degree of power (“SMP”) in the retail mobile services market, and that due to this it is strategically putting in place significant differences in off-net and on-net call prices in a way that increases the barriers to entry and expansion and risks foreclosing the market to competition. So far Digicel has not claimed or sought to show that these pricing differences are justified by objective differences in the cost of supply of on-net versus off-net calls. Further, NICTA has concluded that Digicel is likely to continue for the foreseeable future to have this SMP and, in the absence of the recommended determination, be able to continue this behaviour, which is to the long-term detriment of competition in the retail mobile services market.

Especially in a market where one operator has SMP, as represented by a much larger network and customer base, pricing on-net calls substantially below off-net calls can and is likely to have very damaging consequences for competition. These stem from the strategic incentive created by the existence of a call externality (that is, the benefit that is enjoyed by the receiver of a call that is made by another mobile subscriber) and the ability of a mobile network operator with a substantial degree of market power (SMP) to act upon that incentive. A mobile network operator in such a position can strategically manipulate the relative difference between its on-net and off-net prices, by making on-net calls significantly less expensive, in order to reduce the number of (off-net) calls made to subscribers on a rival network and, thus, the attractiveness of that rival network to existing and potential subscribers. There is a clear consumer detriment involved here with the increased burden associated with connectivity between subscribers to different networks, and the unwinding of the amenity that is intended to benefit all subscribers through interconnection arrangements.

NICTA regards this as an inappropriate and anti-competitive application of on-net/off-net price discrimination as it has serious anti-competitive consequences in the form of increased barriers to entry and/or expansion and customer lock-in which, in turn, can lead to the foreclosure of the market to competition. Such pricing

behaviour can also reduce the rival network's profits and cash flows and, thus, its ability to reinvest in the factors of competition.

These negative consequences are magnified when there is a large difference between the off-net retail price and the on-net retail price and the mobile termination rate (MTR) is substantially above-cost. If the actual costs of termination are significantly lower than the prevailing MTR, then the larger network operator can price on-net calls close to, or even below, the MTR. The smaller network's off-net prices will need to be competitive with the larger network's on-net prices. However, the MTR effectively imposes a price floor under the off-net prices that cannot be economically offered by the smaller network. As a greater proportion of the smaller network's traffic is likely to be off-net (because there are more people to call on the larger network), the smaller network will have to pay the mobile termination charge for a larger proportion of traffic than the larger network. This creates potential for a margin squeeze on the smaller network. NICTA doubts that the current MTRs are set at a level that reflects cost<sup>13</sup>, but has formed no final conclusion on the matter. NICTA is of the view that there are costs associated with termination of on-net calls that need to be taken into consideration when cost differences are claimed between on-net and off-net calls.

Digicel has SMP in the retail mobile services market (unlike either Bmobile or Telikom), and its mobile customer numbers and base are very much larger than any competitor.<sup>14</sup> Further, NICTA believes that the structure of Digicel's on-net/off-net prices, and the scale of its discrimination between on-net and off-net prices both before and after the application of the 2012 retail service determination, reflects a strategic manipulation of the relationship between its on-net and off-net prices in an effort to make off-net calls unduly expensive and unattractive to its subscribers relative to on-net calls and deter the making of such calls entirely. This in turn has a significant and unfair impact on the ability of Digicel's rivals to compete against it. These circumstances are exacerbated by the relatively small size of the retail mobile services market and the highly asymmetrical market share positions of Digicel

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<sup>13</sup> The current MTR has been established by negotiation between the operators concerned and no claim has been made by any operator that they are cost based.

<sup>14</sup> Based on the most recent data provided to NICTA, Digicel appears to have over 90% market share for mobile originated national calls.

compared to its competitors. The extremely high proportion of total mobile traffic in PNG that remains on-net (and in particular the proportion of on-net calls within Digicel's network)<sup>15</sup> also suggests that on-net/off-net price discrimination is distorting the distribution of traffic, increasing barriers to entry, reducing competition, and making it unduly expensive for customers of Digicel to call customers of other telecommunications suppliers.

Digicel has continued to have SMP and indeed a monopoly or virtual monopoly share (well above 80% of the mobile services market since 2012 and, since the expiry of the 2012 RSD, has re-introduced pricing with large off-net/on-net discrimination (i.e. off-net prices being substantially greater). During the Public Inquiry, Digicel has strongly defended and made it clear that it wishes to continue such price discrimination. NICTA therefore has concluded that the recommended retail service determination is an appropriate response in accordance with the Act, to address this situation.

NICTA's recommendation for a retail service determination also is less drastic than other alternative outcomes, namely an absolute prohibition on on-net/off-net price discrimination (as suggested by commenters such as Bmobile) and the absence of any limitations at all on such discrimination (as suggested by Digicel, and as per the situation since the expiry of the 2012 RSD).

NICTA also has fully considered all information and submissions provided by Digicel in support of its position, including the opinion of Digicel's retained expert that under certain conditions some price discrimination of this kind can have consumer welfare enhancing effects. NICTA has concluded that while this may occur in some circumstances, those circumstances do not now exist in Papua New Guinea and are not likely to exist for the foreseeable future, and at minimum during the next 3-5 years. Digicel also has contended that consumers may benefit more from lower priced on-net calls that they do from the (longer-term) benefits of enhanced competition due to on-net / off-net price discrimination being limited, as per the recommended retail service determination. NICTA, however, does not believe this is correct currently, or likely to be correct for the foreseeable future. Digicel is in a

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<sup>15</sup> Over 95%

position to provide lower prices to consumers without its off-net prices being substantially greater than on-net prices and to an extent not justified by cost differences. NICTA also takes the view that Digicel is in a position to provide low and attractive r prices for on-net calls as may enhance consumer welfare without having to impose off-net call prices that are much higher than on-net prices. One reason for this is that the overwhelmingly large percentage (around 95%) of calls that are on-net. Furthermore, if Digicel wishes to propose a price differential between on-net and off-net calls in circumstances in which Digicel believes the benefits to consumers outweighs harm to them and competition, it may make application to NICTA, together with relevant cost justification, for approval.

## **5 THE EXTENT TO WHICH THE RETAIL REGULATION CRITERIA ARE MET BY THE RECOMMENDED DETERMINATION**

NICTA has considered whether the retail regulation criteria in section 158 of the Act would be met by the making of the proposed retail service determination at Annex A and is satisfied that they would be.

The extent to which each criterion would be met by the proposed retail service determination is identified below.

### **5.1 CRITERION 1: THE COMPETITION AND EFFICIENCY OBJECTIVES**

The first retail regulation criterion is that the making of a retail service determination for the retail service in respect of an operator licensee for a particular period will further the achievement of the objective set out in section 124 of the Act (but disregarding subsection 124(2)).

In relation to the competition objective, NICTA is satisfied that based on the evidence and having regard to the academic literature and practices in other relevant jurisdictions that the proposed retail service determination will promote effective competition in the retail mobile services market by:

- (a) reducing the anti-competitive effects of Digicel's excessive on-net/off-net price discrimination (i.e. prohibiting undesirable anti-competitive uses of on-net/off price discrimination); while also
- (b) providing opportunity for Digicel to continue to use a reasonable level of on-net/off-net price discrimination (i.e. where a price differential between on-net and off-net calls is objectively justified by cost differences between the two services).

Further, NICTA believes that if the proposed retail service determination is not made, then the risk of further harm from the anti-competitive effects of Digicel's much more pronounced on-net/off-net price discrimination will not be addressed and will damage the long term prospects for effective competition in the retail mobile services market.

In relation to the efficiency objective, if Digicel's past or future investments are based on the current low level of competition that at least in part is a consequence of the scale of its on-net/off price discrimination, then that investment will tend towards being inefficient. That is, because of the depressed competition, investments by the dominant operator will lack the discipline and shaping that occurs when investments into effectively competitive markets are being considered. This does not mean that only investments in effectively competitive markets can be efficient; rather it simply means that in the absence of effective competition, investment signals and rationales will be distorted, which can lead to inefficient investment much more than investments made under the discipline and influence of effective competition. This is in nobody's interest.

There is also the matter of efficient investment by competing mobile operators – Bmobile and Telikom. In making their investments these operators are entitled to assume that the market will be reasonably and sustainably competitive or, at the least, that anti-competitive behaviour, such as Digicel's current on-net/off-net price discrimination, will be addressed through appropriate regulatory intervention and settings. If anti-competitive behaviour is permitted to persist it can undermine the investment incentives of those operators and/or reduce their investment below the levels that they would otherwise be inclined to make. This also is not in the interests of sustaining a competitive market.

## **5.2 CRITERION 2: SUBSTANTIAL MARKET POWER**

The second retail regulation criterion has three aspects that all relate specifically to the competition objective:

- (a) that the operator licensee has a substantial degree of power in the market within which the retail service is supplied;
- (b) in the absence of the retail service determination for that period, that substantial degree of power is likely to persist in the market over that period; and
- (c) in the absence of the retail service determination for that period, that substantial degree of power is likely to expose retail customers to a material risk of higher prices and/or reduced service where they acquire the retail service from that operator licensee during that period.

Mobile originated national retail voice call services are supplied in the retail mobile services market. NICTA has found that Digicel has a substantial degree of power in that market and that the evidence of that market dominance is clear and overwhelming. The factors that—considered in aggregate—NICTA found most compelling in reaching this conclusion are:

- Digicel's high and prevailing market shares (Digicel's has 89% of all mobile subscribers in PNG, earns more than 95% of the total market revenues, and generates more than 95% for the total voice traffic in the market);
- Digicel's substantially greater network reach and being first in with a high coverage of both territory and population;
- Digicel's price leadership and its ability to sustain on average higher prices than its competitors; and
- Digicel's use of strong network effects (specifically tariff mediated network externalities derived from the scale of its discrimination between on-net and off-net prices) to reinforce its market share and overall market position.

In the absence of the proposed retail service determination—which NICTA has concluded is the only practicable ex ante regulatory option in the circumstances—NICTA believes that there is every indication that Digicel's SMP will persist. Indeed, NICTA believes that if Digicel is able to maintain the current scale of its on-net/off-net price discrimination then the likely consequence will be the irreversible reinforcement of Digicel's dominance in the retail mobile services market. It is also clear that if the retail service determination is not made, that Digicel's customers will continue to be subject to unnecessarily high prices for mobile-to-mobile off-net calls.

In making these claims NICTA is aware that Digicel's position of SMP has persisted, and on some measures strengthened, during the period of the 2012 retail services declaration. In its response to the public consultation, Digicel argued that this fact demonstrates the failure of the 2012 retail services declaration and hence the futility of NICTA recommending any further RSD limiting Digicel's on-net / off-net price discrimination. This argument is not persuasive for several reasons. First, the former retail service determination allowed for quite significant (40%) price discrimination, and in that respect is more permissive than the RSD now being recommended. In this respect it appears that the 2012 retail services declaration

may have been too lax, allowing Digicel too great a freedom for price differentiation, and hence that a new and stronger RSD is now required. Also, the fact that Digicel has not lost market share during the time of the 2012 RSD does not mean that RSD was a failure. A reduction in barriers to competition, or an enhancement of competition, from a regulatory measure such as that RSD, does not necessarily mean or require that any competitor will be less successful. Digicel argues that its competitors did not sufficiently pursue the competitive opportunities available to them, for example, by expanding service coverage and improving their service quality. But a regulatory measure cannot assure or guarantee such efforts, it can only remove or reduce barriers to entry or other obstacles to competition, in accordance with the requirements of the Act. NICTA's position under the Act therefore is, and always has been, to favour competition, not any particular competitor(s).

### **5.3 CRITERION 3: ACHIEVEMENT OF A RETURN ON ASSETS**

The third criterion relates specifically to the efficiency objective and requires that the operator licensee will not be prevented from achieving a return on assets during the period the determination is in effect that is sufficient to sustain the investment necessary to supply the retail service.

NICTA believes that this criterion requires a suitable, adequate or commercial return (taking account of the adjustments necessary for the associated risks) on the assets that the licensee employs to supply the retail service. This criterion does not require a current return to be maintained or a return considered desirable by the licensee to be maintained or achieved (otherwise no retail service determination that involved regulation of a retail price would be likely to satisfy this criterion).

NICTA is satisfied that the proposed retail service determination meets this criterion. The proposed determination does not increase the cost burden on Digicel. If there are genuine differences in the costs associated with terminating calls off-net and on-net, the proposed determination provides a means for such costs to be covered through price differentials if Digicel so desires. Even if Digicel chooses not to pursue such cost-justified price differentials it should be noted that more than 90% of its calls are on-net so the revenue/profit impact of under-recovery of cost on off-net

calls will quite easily be compensated through profits on on-net calls. (It may be noted also that for Digicel's competitors to match such tariffs, they would in all likelihood have to suffer losses on the much higher proportion of their traffic that is off-net, so it may well be in Digicel's commercial interests not to apply for cost-justified price differentials).

#### **5.4 CRITERION 4: THE LIKELY BENEFITS OUTWEIGH THE LIKELY DETRIMENTS**

The fourth criterion is that the aggregate likely benefits of making the retail service determination outweigh any aggregate likely detriments.

After weighing the aggregate likely benefits and aggregate likely detriments of the proposed determination, and also weighing those benefits and detriments against the aggregate benefits and aggregate detriments of maintaining the status quo (i.e. not making the proposed determination), NICTA is satisfied that the proposed determination would meet this criterion.

NICTA found that the key benefits of making the proposed determination included that:

- It provides a clear and reasonable principle, cost justification, in which on-net / off-net price discrimination can occur, and addresses the significant negative effects of the currently high levels of on-net / off-net price discrimination by Digicel; ;
- competition in the retail mobile services market would become based on merits and costs with consequential market growth and a shift towards an effectively competitive market;
- network effects would be available at the market level instead of solely at the operator level, enabling the benefits to be better enjoyed by all mobile phone users;
- competition in the retail mobile services market would be on a more level playing field, with licensees attracting subscribers based on the innovativeness, quality and value of their services instead of disproportionate weight being given to the relative size of their subscriber base;
- the distortion of mobile originated traffic flows due to price-discrimination would be minimised, in particular distortion in the form of suppression of the use by

consumers of off-net calls and the burden of requiring them to consider whether the person they are calling is off-net;

- it would encourage increased investment in the retail mobile services market by the non-dominant operators;
- it may lead to a review of pricing structures and levels by Digicel and, in response, the other mobile network operators which would stimulate competition in the retail mobile services market and/or lead to increased value being offered to all mobile phone users.

Digicel made claims of possible detriments from the proposed determination, including that:

- it may lead to Digicel's average on-net prices increasing for the purposes of compliance in the short to medium term; and
- it may delay or reduce investment by Digicel in the retail mobile services market in the short to medium term.

Both of these claimed detriments are considered by NICTA to be unlikely to occur, and therefore, on one interpretation of the words used in the fourth criterion, may not need to be taken into account at all (i.e. as they are not considered to be 'likely detriments'). Nevertheless NICTA considered these further, and concluded that they were not a sufficient to abandon, or modify, the recommended RSD. This is discussed further below.

The reason why Digicel is unlikely to increase on-net calls in order to comply with the recommended determination is because such calls account for over 95% of calls. Rather than jeopardise this revenue stream (which is also the main source of mobile operator profits) Digicel is likely to absorb any losses that may arise from off-net calls.

In addition, NICTA has concluded that the aggregate benefits of the determination outweigh the benefits of doing nothing for the reasons already stated. NICTA has further concluded that the risks and consequences of *not* intervening through an ex-ante measure in the form of the determination are worse than the risks and consequences of any potential intervention on an ex-post basis in response to a specific abuse of dominance by Digicel. The latter form of intervention is costly and

may be protracted as a case is prepared. During that period there is a material risk that irreversible damage may be inflicted on competition and on consumer welfare.

## **6 CONCLUSION**

For the reasons summarised in this Report, and having considered all information and comments of interested parties, NICTA is satisfied that all of the retail regulation criteria would be met by the Minister's making of the proposed retail service determination provided at Annex A.

## **ANNEX A: DRAFT RETAIL SERVICE DETERMINATION**

### **RETAIL SERVICE DETERMINATION No. 1 of 2018**

#### ***National Information and Communications Technology Act 2009***

I, SAMUEL BASIL, Minister for Communication and Information Technology, acting on the recommendation of the National Information and Communications Technology Authority and having had regard to the Retail Regulation Criteria, make the following Retail Service Determination under section 160 of the *National Information and Communications Technology Act 2009*.

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### **PART I – PRELIMINARY**

#### **1 Name of the Determination**

This Determination may be cited as *Retail Service Determination No.1 of 2018*.

#### **2 Commencement and expiry**

- (1) This Determination shall come into force on the date gazetted (*the Commencement Date*).
- (2) This Determination shall expire on the day before the fifth anniversary of the Commencement Date, provided however that by the third anniversary of the Commencement Date, NICTA will review this determination and make a Report to the Minister, including any recommendation, if warranted, to revise or revoke this Determination.

#### **3 Definitions**

- (1) Subject to subsection (2), unless the context otherwise requires, terms used in this Determination have the same meaning as in the Act.
- (2) In this Determination, unless the context otherwise requires:
  - (a) “*Act*” means the *National Information and Communications Technology Act 2009*;
  - (b) “*day*” means a calendar day;

- (c) **“Digicel”** means Digicel (PNG) Limited with company registration number 1-55909;
- (d) **“fixed-fee service bundle”** means any combination of voice calls, whether On-net Calls or Off-net Calls, and/or SMS and/or data services that is sold by Digicel for a pre-determined price regardless of usage up to certain pre-determined usage limits.
- (e) **“individual service tariff”** means the price charged for a Regulated Mobile Service when sold on a stand-alone basis
- (f) **“on-net call”** means a national voice call that originates and terminates on Digicel’s mobile network;
- (g) **“off-net call”** means a national voice call that originates on Digicel’s mobile network and terminates on the mobile network of another licensee;
- (h) **“prepaid”** means being charged in such manner that payment is made before a service is used;
- (i) **“post-paid”** means being charged in such manner that payment is made after a service is used, normally by means of a monthly bill;
- (j) **“promotional offer”** means any special tariff offer of limited duration that is made by Digicel;
- (k) **“regulated mobile service”** means:
  - (i) a prepaid mobile originated retail national voice call service; or
  - (ii) a post-paid mobile originated retail national voice call service.
- (l) **“SMS”** means short message service.

NOTE: The following terms are defined in the Act:

- retail regulation criteria;
- network
- NICTA
- price
- retail service

#### **4 Application**

- (1) This Determination applies to Digicel’s supply of Regulated Mobile Services.

## **PART II – PRICING PRINCIPLES**

#### **5 Limit to price discrimination between On-net Calls and Off-net Calls**

- (1) Digicel shall not offer or charge prices for a Regulated Mobile Service that discriminate on the basis of the mobile network that will terminate the call, except that Digicel may price Off-net Calls above the price of On-net Calls to the extent that:
  - (a) any such price differential is objectively justifiable based on differences in the costs of supplying the service;
  - (b) such objective justification has been approved by NICTA following application by Digicel, such approval to be granted as expeditiously as possible bearing in mind the complexity of the evidence and of the issues raised by the application; and
  - (c) the price differential applies only to Individual Service Tariffs and, separately, for calls within a Promotional Offer, and separately for call usage outside of a Fixed-fee Service Bundle.
- (2) For the avoidance of doubt, where Digicel offers Regulated Mobile Services within a Fixed-fee Service Bundle no discrimination between On-net Calls and Off-net Calls is allowed.

## **6 Consistent basis for charging and billing**

- (1) The basis upon which a Regulated Mobile Service is charged or billed (for example, per minute or per second) shall not differ between On-net Calls and Off-net Calls.

## **PART III – IMPLEMENTATION**

### **7 Compliance reporting**

- (1) Digicel shall, within one (1) day of launching any new Individual Service Tariff, Fixed-fee Service Bundle or Promotional Offer, publish details of the price and related conditions for the service or offer on its website and provide full details to NICTA demonstrating its compliance with the requirements of this Determination.
- (2) Digicel shall, within one (1) day of withdrawing any new Individual Service Tariff, Fixed-fee Service Bundle or Promotional Offer, remove details of the price and related conditions for the service or offer from its website and inform NICTA of the withdrawal.

### **8 Compliance enforcement**

- (1) NICTA may at any time serve notice to Digicel requiring it to withdraw from service any Individual Service Tariff, Fixed-fee Service Bundle or Promotional Offer that it finds to be in breach of the requirements of this Determination.
- (2) In serving such notice NICTA must:
  - (a) provide reasons for its decision; and
  - (b) give Digicel a minimum of ten (10) days to:

- i. accept the notice, withdraw the offending tariff and notify all customers affected by the withdrawal; or
  - ii. submit additional evidence that demonstrates the tariff's compliance with the requirements of this Determination.
- (3) In the case of Digicel providing additional evidence under paragraph (2)(b)ii, NICTA may either accept this evidence and rescind its notice to withdraw a tariff or promotional offer or it may issue a final notice that requires Digicel immediately to withdraw the offending tariff or promotional offer and notify all customers affected by the withdrawal, or take such other action as is permitted to NICTA under applicable law.

Made at Port Moresby this [DATE] day of [MONTH] 2018.